(2)

Supreme Court, U.S.
FILED
DEC 8 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-801

In The

Supreme Court of the United States

October Term, 1988

VSL CORPORATION, INC., et al.,

Petitioners,

vs.

CONMAR CORPORATION, et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

ROBERT A. SUSK
Counsel of Record
LESLIE J. MANN
JOHN H. DRESSLAR
LAW OFFICES OF ROBERT A. SUSK
101 California Street, Suite 4450
San Francisco, California 94111
(415) 982-3950
Counsel for Respondents
Conmar Corporation, L.R. Yegge
Company and Lawrence R. Yegge

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

23 pp

QUESTIONS PRESENTED

In an antitrust action alleging *inter alia* violation of Sections 1 and 2 of the Sherman Act, defendants (Petitioners herein) moved on statute of limitations grounds both to dismiss under Federal Rule of Civil Procedure 12(b)(6) and for summary judgment under Rule 56. Plaintiffs (Respondents herein) alleged tolling of the statute by the defendants' fraudulent concealment.

With respect to grant or denial of the motion for summary judgment, Respondents contend that the questions that are in fact presented by the legal issues raised in the Petitioners' petition are:

1. Where the only information available to the plaintiffs is the unpublicized filing of a criminal information charging one defendant with aiding and abetting unspecified Customs reporting violations and the plaintiffs have no knowledge of the filing, whether there is a genuine issue of fact as to whether the plaintiffs should be charged with constructive notice of the filing and from that notice should be charged with constructive knowledge of their antitrust claims.

2. Whether a court may determine that a genuine issue of material fact exists as to whether antitrust defendants fraudulently concealed their antitrust violations by means of either (a) the defendants' submission to the government of falsified Customs and other financial reports misstating the prices at which products were sold among antitrust conspirators, or (b) a defendant's making of public statements to the media that falsely both deny government charges and present alternative exculpatory explanations for the charges.

3. If the acts described in the second Question Presented by Petitioners as a matter of law cannot constitute "fraudulent concealment," whether a District Court properly can, at the outset of a lawsuit, grant summary judgment without affording the plaintiffs an opportunity to take *any* discovery to determine if further acts of concealment occurred.

TABLE OF CONTENTS

Page

Statement Of The Case 2

Reasons Why The Petition Should Be Denied 6

I. The Decision Of The Ninth Circuit Does Not Raise A Conflict With Decisions Of Other Federal Courts Of Appeals Regarding Charging Prospective Plaintiffs With Knowledge Of All Facts In The "Public Record" 6

A. Neither The Decisions Below Nor The Record Raises The First Question Presented By Petitioners 6

B. The Holding Of The Court Below That Respondents Were Not On "Inquiry Notice" Of Their Claims Is Not In Conflict With the Decisions Of Other Federal Courts Of Appeals 10

II. The Decision Of The Ninth Circuit Does Not Raise A Conflict With Decisions Of Other Federal Courts Of Appeals Regarding The Sufficiency Of Allegations Of Fraudulent Concealment 14

A. Neither The Decisions Below Nor The Record Raises The Second Question Presented By Petitioners 14

B. The Decision Of The Ninth Circuit Is Not In Conflict With Those Of Other Circuits 16

Conclusion 17

TABLE OF AUTHORITIES

Pages

CASES

Arneil v. Ramsey, 550 F.2d 774 (2d Cir. 1977)..... 11, 12

Board of Education of Evanston Township High School District No. 202 v. Admiral Heating and Ventilation, Inc., 94 F.R.D. 300 (N.D. Ill. 1982).....9

Campbell v. Upjohn Co., 490 F.Supp. 722 (W.D. Mich. 1980), *aff'd* 676 F.2d 1122 (6th Cir. 1982) 13

Dayco Corp. v. Goodyear Tire & Rubber Company, 523 F.2d 389 (6th Cir. 1975)..... 13, 16

F. Buddie Contracting, Inc. v. Seawright, 599 F.Supp. 422 (N.D. Ohio 1984).....9

In re Beef Industry Antitrust Litigation, 600 F.2d 1148 (5th Cir. 1979)..... 9, 12

King & King Enterprises v. Champlin Petroleum Co., 657 F.2d 1147 (10th Cir. 1981).....16

Mt. Hood Stages, Inc. v. Greyhound Corp., 555 F.2d 687 (9th Cir. 1977).....9

Pocahontas Supreme Coal Co., Inc. v. Bethlehem Steel Corp., 828 F.2d 211 (4th Cir. 1987)..... 8, 12

Robertson v. Seidman & Seidman, 609 F.2d 583 (2d Cir. 1979) 8, 12

Texas v. Mead, 465 U.S. 1041 (1984).....9

United Klans of America v. McGovern, 621 F.2d 152 (5th Cir. 1980).....12

Willmar Poultry Company v. Morton-Norwich Products, Inc., 520 F.2d 289 (8th Cir. 1975).....13

No. 88-801

In The

Supreme Court of the United States

October Term, 1988

VSL CORPORATION, INC., et al.,

Petitioners,

vs.

CONMAR CORPORATION, et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Conmar Corporation, L. R. Yegge Co., and Lawrence R. Yegge[1] ("Respondents") respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 858 F.2d 499 (1988).

[1] Respondents Conmar Corporation, L.R. Yegge Co., and Lawrence R. Yegge have no parent companies or subsidiaries to list pursuant to Supreme Court Rule 28.1. Conmar Corporation and L.R. Yegge Co. are affiliated by common ownership with L. Yegge and Associates, a proprietorship, and with Stresstek, a trade name used by Respondents.

STATEMENT OF THE CASE

Petitioners seek what essentially is interlocutory review of a decision by the United States Court of Appeals for the Ninth Circuit which ruled that summary judgment on statute of limitations grounds was *not* warranted on the record before the District Court for the Northern District of California. The Ninth Circuit, since issuing its opinion, has rejected Petitioners' request that it stay issuance of its mandate to the District Court. The litigation has resumed in the District Court at the pleading stage.

This litigation does not come to this Court in a posture where it can resolve the legal issues that Petitioners present. To create an appearance of a conflict among various Courts of Appeals, Petitioners have crafted narrow questions as to the information constructively disclosed by "public records" and as to what constitutes fraudulent concealment. As might be expected in view of the early stage at which Petitioners' summary judgment motion was brought and the District Court's granting of the motion on grounds not asserted here, each such Question is itself premised upon unsupported factual inferences which the District Court did not or could not draw from the evidence before it. Moreover, each Question's focus is too limited to resolve the issue raised. In short, Petitioners request that this Court make what at best would be an advisory ruling as to the doctrine of fraudulent concealment; the dispositiveness of any adjudication by this Court would be contingent upon the District Court's subsequent treatment of factual, substantive and evidentiary questions that have not yet been determined, and upon the fruits of any discovery that subsequently

would be required in order to address the issues that have not yet been addressed.

Respondents incorporate for purposes of this Brief the decision of the Court of Appeals below. In light of the Petitioners' raising of new issues, several further facts in the record should be highlighted.

First, several factual and evidentiary issues remain unresolved regarding the January 1982 criminal information (which charged petitioner VSL Corporation with aiding and abetting Customs reporting violations) and the single purported newspaper article regarding that Information. (Petitioners' first Question Presented is based entirely upon the constructive knowledge, if any, imparted by those two documents.) The contents, completeness and prominence of those two documents of course is crucial to the determination of the information of which Respondents may be charged with having constructive knowledge. The twelve-count Information itself was not in the record before the District Court, but rather was introduced for the first time before the Court of Appeals in Petitioners' "Additional Excerpts of Record Not Submitted By Appellants And Addenda," Addendum 3. Similar foundational problems confront the photocopy of the sole purported news article which indicated that VSL had pled guilty to the charges in the January 1982 Information; the copy of the article was timely objected to by Respondents as inadmissible because it was unauthenticated and, as was noted by the Court of Appeals, " . . . undated and unlocated as to page." Petitioners' Brief, Appendix A, at 8.

The District Court did not directly address either the objections to or the inferences that could be drawn from the two documents disclosing the 1982 Information, presumably because it found that Respondents should be deemed to have had constructive knowledge of their antitrust claims from the earlier June 1981 indictment of an employee of petitioner Mitsui and one of its customers related to Customs reports concerning the importation of steel nails. *Id.*, Appendix B-3.[2] This Court's granting of Petitioners' petition therefore would require it to examine and to rule in the first instance upon the admissibility of the purported news article and the antitrust significance of the statements made in each count of the Information and in the article (bearing in mind of course that all inferences to be drawn from those documents must be drawn in favor of Respondents).

Second, Petitioners misstate the allegations in Respondents' Second Amended Complaint in an attempt to convince this Court that constructive notice to Respondents of charges on the one hand that VSL had aided and abetted Customs reporting violations as a matter of law gave to Respondents constructive notice of facts underlying their antitrust claims, on the other hand. Petitioners assert, without quoting the Second Amended Complaint:

---

[2] The Court of Appeals below ruled that the June 1981 charges of Customs reporting violations regarding *steel nails* and a subsequent unpublicized private antitrust action also involving the steel nail industry did not as a matter of law give Respondents constructive notice of their claims. Petitioners' Brief, Appendix A-10, 12. Petitioners do not challenge that ruling.

> "Because Respondents' Complaint expressly acknowledges that the VSL guilty plea concerned the same facts as the alleged antitrust conspiracy, it cannot be disputed that the facts in the VSL guilty plea were either sufficient to put Respondents on notice of their antitrust claims, or were at least sufficient to arouse Respondents' suspicion."

Petitioners' Brief at 11. To the contrary, the Second Amended Complaint, CR 5, in no way limits its antitrust allegations to the Customs violations. The Second Amended Complaint alleges, at Paragraphs 26, 27 and 30, the commission of various predatory acts by Petitioners without any mention of Customs or importation practices. The Second Amended Complaint goes on to state in Paragraph 31:

> "All of the acts of Defendants in accomplishing and furthering the conspiracy and predatory conduct in furtherance of, and as the object of, the conspiracy in restraint of trade are not presently known to PLAINTIFFS but some of said acts include conspiring and agreeing that [Petitioners' sales of PC Strand to VSL would be made at an unfair or unlawfully low price]."

Paragraph 37 of the Second Amended Complaint reasserts that all such predatory or unlawful acts of Petitioners ". . . are not yet fully known by PLAINTIFFS."

Third, Petitioners inaccurately suggest by their assertion of the second Question Presented that Respondents' allegations of the Petitioners' acts of fraudulent concealment are limited to Petitioners' (1) submission of false Customs documents and (2) false public statements in response to government Customs charges (and thus that summary judgment properly could be granted if this Court were to rule that those actions of the Petitioners could not satisfy the fraudulent concealment standard).

In fact, Respondents allege in the Second Amended Complaint that Petitioners' fraudulent concealment of their actions was achieved ". . . by various schemes and devices, including . . ." falsification of Customs and *other* types of commercial documents and further actions "not yet fully known by PLAINTIFFS . . ." The District Court did not address the sufficiency *vel non* of the fraudulent concealment allegations, but instead ruled that, assuming that fraudulent concealment initially occurred, Respondents subsequently received constructive notice of their possible claims. The District Court therefore did not conduct any review of Customs or other commercial documents to assess such initial concealment, no such documents appear in the record, and the District Court refused to defer the summary judgment motion to permit Respondents to undertake the discovery needed to confirm the extent of such concealment.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE DECISION OF THE NINTH CIRCUIT DOES NOT RAISE A CONFLICT WITH DECISIONS OF OTHER FEDERAL COURTS OF APPEALS REGARDING CHARGING PROSPECTIVE PLAINTIFFS WITH KNOWLEDGE OF ALL FACTS IN THE "PUBLIC RECORD."

A. Neither the Decisions Below Nor the Record Raises the First Question Presented.

The first Question Presented by Petitioners is whether or not a prospective plaintiff can be charged with constructive knowledge of all facts in the "public record," which they assert includes the 1982 VSL information and the single putative news report of VSL's guilty plea. Petitioners go on to argue that, had the Court

of Appeals below held Respondents responsible for knowing all facts in the public record, the summary judgment motion properly would have been granted. Finally, they argue that the Court of Appeals' failure to charge Respondents with such knowledge places the Ninth Circuit in conflict with other circuits on that issue.

In fact, this syllogistic chain breaks at virtually every link. As is detailed in the Statement of Facts, above, the content of the purported public record is far from clear. The criminal Information gives no clue as to the nature of the *alleged* Customs reporting violations or whether or not such violations might have in any way involved acts that might have an effect upon Respondents' business.[3]

---

[3] Each of the eleven counts of the Information filed against VSL (a twelfth misdemeanor count was asserted against an individual for assisting VSL) read in total:

> *COUNT [No.]*
>
> On or about [Date] within the Central District of California,
>
> VSL CORPORATION
>
> defendant herein, willfully and knowingly aided and abetted the entry and introduction and attempted entry and introduction into the commerce of the United States from Japan, imported merchandise, that is, steel strand for prestressed concrete (P. C. Strand), by means of false statements and declarations including a commercial invoice which the defendant knew were materially false in that said commercial invoice contained false statements of material facts as to the true purchase or invoice price of said merchandise; in violation of Title 18, United States Code, Sections 542 and 2.

Moreover, the article purporting to report upon VSL's guilty plea is patently inadmissible.[4]

The most substantial obstacle to Petitioners' assertion that this Court should hold Respondents chargeable with knowledge of all information in the purported public record is that such a ruling of law would fall far short of disposing of the fraudulent concealment question. A substantial and fact-intensive inquiry would remain in order to determine whether or not constructive knowledge of the Customs reporting violation charges should be equated with knowledge of the antitrust claims. Federal courts throughout the country consistently have ruled that knowledge of other charges that do not involve the plaintiffs or which involve wrongdoing of a slightly different kind preclude a determination on summary judgment that the plaintiff was knowledgeable concerning his own claims. *See Robertson v. Seidman & Seidman*, 609 F.2d 583, 593 (2d Cir. 1979) (plaintiff's constructive knowledge of loss of stock value coupled with the defendant accounting firm's withdrawal of its prior financial reports did not constitute knowledge of fraud by that accounting

---

[4] Petitioners present no authority supporting their contention that a newspaper article should be considered a "public record." In addition, unlike the existing publicly-filed corporate records involved in *Pochahantas Supreme Coal Co., Inc. v. Bethlehem Steel Corp.*, 828 F.2d 211 (4th Cir. 1987), the putative news article apparently was published, if at all, over a year after Petitioners assert that Respondents should have commenced their inquiry; *no* court has required a prospective plaintiff to conduct a continuing review of newspapers to determine if facts might later be uncovered to justify filing of a lawsuit.

firm); *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1170 (5th Cir. 1979) (knowledge of similar antitrust claims did not as a matter of law give notice to the plaintiff of his claims); *Mt. Hood Stages, Inc. v. Greyhound Corp.*, 555 F.2d 687, 698 (9th Cir. 1977) ("Awareness of growing dominance of the market was not equivalent to notice of monopolization . . . "); *F. Buddie Contracting, Inc. v. Seawright*, 599 F.Supp. 422, 430 (N.D. Ohio 1984) (no notice of claim from plaintiff's knowledge of defendant's receipt of a government contract despite the presence of lower bids and defendant's refusal to quote equipment prices to competitors); *Board of Education of Evanston Township High School District No. 202 v. Admiral Heating and Ventilation, Inc.*, 94 F.R.D. 300 (N.D. Ill. 1982) (reports of bid-rigging in both downstate projects and one other local project by contractor-defendants did not necessarily give notice of bid-rigging on jobs conducted for plaintiff).

Nothing in Respondents' Second Amended Complaint suggests, must less compels a conclusion, that Respondents have conceded that they should have surmised from the two Information-related documents that the filing of antitrust claims was warranted. The District Court did not find that Respondents had made any such concession, and the Court of Appeals expressly ruled, Petitioners' Brief at A-7, that Respondents' mention of the guilty plea in their Complaint does not constitute such an admission.

This Court is not the forum in which to resolve predicate questions of fact and evidentiary law that would be required in order to reach the legal issues presented by Petitioners. *See Texas v. Mead*, 465 U.S. 1041, 1041 n.2 (1984) (Stevens, J.) (petition for writ of certiorari

properly denied where resolution would require the Court to conduct a *de novo* review of a jury *voir dire* transcript. In any event, because this Court's resolution of the purported conflict presented by the first Question Presented would leave unresolved the question of whether the "public record" disclosed Respondents' antitrust claims, the Petition should be denied as seeking merely an advisory ruling from this Court.

B. The Holding of the Court Below That Respondents Were Not On "Inquiry Notice" of Their Claims Is Not In Conflict With the Decisions of Other Federal Courts of Appeals.

Even if the meager "public record" regarding the 1982 VSL Information were deemed to disclose Respondents' antitrust claims, there is no legal basis for Petitioners' contention that the ruling of the Court of Appeals below – that Respondents were not as a matter of law chargeable with *notice* of that record – conflicts with rulings of other circuits. Petitioners inaccurately suggest that questions as to prominence or notoriety of the VSL charges may be side-stepped because five other circuits have held prospective plaintiffs chargeable with knowledge of all public records regardless of their obscurity or of the extent of such plaintiffs' subjective knowledge or suspicions. As is reflected by the Ninth Circuit's reliance in its decision below on several of those decisions of other circuits to which Petitioners refer, the Ninth Circuit's opinion is fully consistent with universally-applied principles.

Petitioners' error becomes evident when the elements of the fraudulent concealment doctrine are examined. As the Ninth Circuit noted in its opinion (and Petitioners do

not dispute), a prospective plaintiff will be charged with constructive knowledge of its claim only when, first, it either has actual suspicions or has constructive knowledge through wide-spread publicity sufficient to excite its inquiry, and, second, where public information that is available from public records which should be examined in such an inquiry would "justify the filing of a complaint." See Petitioners' Brief, Appendix A-8-11. In other words, the availability of information on the public record becomes relevant only at such time as the prospective plaintiff's suspicions initially have or should have been aroused through either actual knowledge or widely-publicized charges. Applying the standard to the record before it, the Ninth Circuit had no difficulty ruling that a question of fact existed both as to whether Respondents should have been on notice of possible claims from the reports of Customs charges, and as to whether available evidence that subsequently could have been uncovered would have been sufficient to justify filing of antitrust claims.

Petitioners' contention that some of the circuits disregard all publicity or actual notice and look only to the facts available on the public record is inaccurate. Examination of the very authorities which Petitioners cite reveals their error.

In the Second Circuit opinion cited by Petitioners, *Arneil v. Ramsey*, 550 F.2d 774 (2d Cir. 1977), the plaintiffs, who were investors in a now-insolvent brokerage firm, were held to have had *actual* awareness of the "critical nature of [the firm's problems]" (i.e., a letter showing that the company had no book value), and the investors in fact had complained that the firm had not made proper

disclosures to them and threatened to file suit. *Id.* at 777. Given such actual suspicions, the Second Circuit held the investors responsible for discovering the defendants' admissions in public records to wilful violations of the federal laws which resulted in the closing of the brokerage firm. The Second Circuit subsequently ruled in *Robertson v. Seidman & Seidman, supra,* after citing to *Arneil,* that where defendants have engaged in active fraudulent concealment, the statute of limitations is tolled until prospective plaintiffs receive *actual* notice of facts underlying their claims. 609 F.2d at 592-93.

Similarly, the decision of the Fourth Circuit in *Pocahontas Supreme Coal Co., Inc. v. Bethlehem Steel Corp.,* 828 F.2d 211 (4th Cir. 1987) does not suggest that a prospective plaintiff is held chargeable with knowledge of all public records regardless of actual or inquiry notice. The Fourth Circuit there simply noted that fraudulent concealment never had taken place regarding interrelationships among the defendant companies because such information was "necessarily discoverable upon simple inquiry and consultation of public records" all along. *Id.* at 218.

The requirement in the Fifth Circuit that a plaintiff have actual suspicion or inquiry notice by wide-spread publicity of potential claims again is demonstrated by the very court opinions upon which Petitioners rely. As Petitioners concede, Petitioners' Brief at 13, the Fifth Circuit in *In Re Beef Industry Antitrust Litigation,* 600 F.2d 1148, 1170 (5th Cir. 1979) found the plaintiffs on inquiry notice only from a *"widely-publicized"* complaint brought against the defendants by another member of the industry (emphasis added). In *United Klans of America v. McGovern,*

621 F.2d 152, 154-55 (5th Cir. 1980), the court upheld a finding that a Ku Klux Klan official was on notice of FBI counter-intelligence activities against him from *actual* notice to him by a letter from the FBI and from network television news coverage of such activities.

Petitioners similarly read far too much into the opinion of the Sixth Circuit in *Dayco Corp. v. Goodyear Tire & Rubber Company*, 523 F.2d 389 (6th Cir. 1975). The Court of Appeals, in finding that the plaintiff was on constructive notice of its antitrust claims, noted that the antitrust allegations made by the plaintiff previously had been made in a Federal Trade Commission suit that had been given *"industry-wide publicity." Id.* at 394 (emphasis added). Furthermore, the Court's ruling in *Dayco* was made in the context of the "due diligence" issue, which is not before this Court. Since the *Dayco* decision, at least one court in the Sixth Circuit has confirmed that where the question of the plaintiff's inquiry notice is at issue, by contrast, the test then becomes whether or not at the relevant time the plaintiff " . . . has, *or ought to have*, knowledge of facts from which wrongdoing could reasonably be inferred . . . " *See Campbell v. Upjohn Co.*, 490 F.Supp.722, 727 (W.D. Mich. 1980), *aff'd* 676 F.2d 1122 (6th Cir. 1982) (emphasis added). Such a standard obviously is inconsistent with Petitioners' contention that the Sixth Circuit has determined that a prospective plaintiff at all times is on notice of all public records relating to its claims.

Finally, the decision of the Eighth Circuit cited by Petitioners does not even reach the issue set forth in the first Question Presented. In *Willmar Poultry Company v. Morton-Norwich Products, Inc.*, 520 F.2d 289, 295 (8th Cir.

1975), the issue decided was *not* whether the plaintiffs were on inquiry notice of their claims, which they apparently conceded was the case, but rather whether "they could not have known, even by the exercise of reasonable diligence, that the defendants were" committing the alleged sales at unfair prices. The Court then affirmed a ruling that the plaintiffs could have found all such pricing information from public testimony before the United States Tariff Commission and from the Commission's final report. *Id.*

II. THE DECISION OF THE NINTH CIRCUIT DOES NOT RAISE A CONFLICT WITH DECISIONS OF OTHER FEDERAL COURTS OF APPEALS REGARDING THE SUFFICIENCY OF ALLEGATIONS OF FRAUDULENT CONCEALMENT

A. Neither the Decisions Below Nor the Record Raises the Second Question Presented.

As was the case with the first Question Presented, Petitioners' second such Question is not raised by either the decisions or the record below. Moreover, the question of whether or not a "denial of wrongdoing" may constitute fraudulent concealment, even if properly raised, would dispose of only a portion of Respondents' allegations of fraudulent concealment.

First, the issue of whether or not the Petitioners committed acts of fraudulent concealment was not addressed by the District Court. As is noted in Respondents' Statement of Facts, *supra*, and confirmed in the opinion of the District Court (Appendix B to Petitioners' Brief), the District Court essentially assumed the sufficiency of the fraudulent concealment allegations, and

focused exclusively on the question of whether or not such concealment was dispelled by subsequent publicity and court filings. The Court of Appeals below briefly addressed the fraudulent concealment issue and confirmed that falsified Customs reports and attempts in statements to the press to explain away the government charges could constitute fraudulent concealment. Not even the Court of Appeals below indicated that it was exhaustively reviewing all the fraudulent concealment charges, and it could not have done so because the record of such concealment before it was limited, due in part to the District Court's refusal to defer the summary motion to permit any discovery. Any ruling by this Court as to the sufficiency of the fraudulent concealment charges by Respondents therefore would at best be advisory and would apply to only a portion of the methods of concealment that Respondents have alleged occurred.

Second, Petitioners' second Question Presented does not even fully address those grounds on which the Ninth Circuit had upheld the sufficiency of Respondents' charges. Petitioners attempt to cause to disappear the entire question of whether their conceded Customs reporting violations may be considered such concealment, as the Ninth Circuit expressly so ruled. This sleight-of-hand is found in Petitioners' Brief in Footnote 9, in which they assert without citation to authority or logic that fraudulent concealment must involve acts or statements made directly to the prospective plaintiffs.

In short, Petitioners ask this Court to review the decision of the Court of Appeals below to determine whether or not a public exculpatory statement – one of many grounds asserted by Respondents as fraudulent

concealment that withheld from them evidence of their claims – should be characterized as a simple "denial," which some circuits *might* refuse to consider as concealment, or instead as a separate act of fraud sufficient to toll the statute of limitations.

B. The Decision Of the Ninth Circuit Is Not In Conflict With Those Of Other Circuits.

Petitioners' apparent assertion that a conflict exists between the decision below and rulings of the Sixth and Tenth Circuits is not supported by the cited opinions of those circuits or by the record below. In *King & King Enterprises v. Champlin Petroleum Co.*, 657 F.2d 1147, 1155 (10th Cir. 1981), the court quoted without comment from the District Court opinion setting out general principles of the doctrine of fraudulent concealment. More significantly, however, the Tenth Circuit then went on to hold that a scheme within the defendant company setting out lists of names of those to whom price-fixing calls could not be made *did* constitute acts sufficient to be deemed fraudulent concealment. Such a holding indicates that a scheme of concealment that does not even require direct denials of wrongdoing may in fact be sufficient to satisfy the doctrine. Petitioners' statements to the press by comparison involved far more active concealment.

Petitioners' separate assertion that the Sixth Circuit holds that denials of wrongdoing cannot constitute fraudulent concealment relies exclusively upon a statement in an opinion by a District Court in that Circuit that later was affirmed (in *Dayco Corp., supra*); the Court of Appeals in its opinion in fact never reached that issue.

By contrast, the special nature of the circumstances leading up to the press statements by the Petitioners suggests that those statements would be held to be sufficient to constitute fraudulent concealment, or at least to raise a question for the jury, in *all* federal Courts of Appeals. As the Court of Appeals noted below, the Petitioners' explanation " . . . that the investigation was based on misunderstanding and misinterpretation of Customs regulations . . . [was] not a situation in which Mitsui simply 'fail[ed] to own up to illegal conduct . . . '", but rather a situation where a denial of wrongdoing occurred before sufficient facts existed to make Respondents suspicious. Petitioners' Brief, Appendix A-13. Such a public statement further can readily be distinguished from a mere denial of wrongdoing made to a plaintiff both due to the alternative explanation offered for the government charges in question and due to the fact that the explanation was made in a public forum where it would be required to withstand public scrutiny. Thus, a fact-based determination as to the reasonableness of any reliance upon those public statements would be required in any court.

CONCLUSION

For the foregoing reasons, Respondents respectfully submit that the interlocutory nature of the instant Petition, coupled with the lack of a sufficient record in the courts below for this Court to address the Questions Presented for the first time, compel the conclusion that this case is not ripe for review by this Court at this stage

of the litigation. Accordingly, the Petition for a Writ of Certiorari should be denied.

Dated: December 8, 1988.

Respectfully submitted,

ROBERT A. SUSK
Counsel of Record
LESLIE J. MANN
JOHN H. DRESSLAR
LAW OFFICES OF ROBERT A. SUSK
Counsel for Respondents
Conmar Corporation, L.R. Yegge
Company and Lawrence R. Yegge